IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 25/06/2004

Coram

The Hon'ble Mr. Justice P. SATHASIVAM
and
The Hon'ble Mr. Justice S. SARDAR ZACKRIA HUSSAIN

Appeal Suit No. 774 of 1989

1. Senthilkumar,
represented by guardian,
Chockalinga Mudaliar.

2. Saraswathi.
.. Appellants/Plaintiffs

-Vs-

1. Dhandapani,

2. Minor Senthilvel,
represented by father and
natural guardian 1st Respondent.

3. Vaidhiyalinga Mudalair. .. Respondents/Defendants.

Appeal Suit is filed under Section 95 of the Code of Civil Procedure read with Order 41 Rule 1 C.P.C., against judgment and decree of the Subordinate Judge, Tindivanam in O.S.No. 57 of 1985 dated 15-2-1989.

!Mr. V. Raghavachari:- For Appellants.

^Mr. D. Srinivasa Raghavan:- For Respondents.

:JUDGMENT

(Judgment of the Court was delivered by P. Sathasivam, J.,)

Unsuccessful plaintiffs in O.S.No. 57 of 85 on the file of Subordinate Judge, Tindivanam, against the dismissal of their suit filed for declaration, delivery of possession, injunction, and for accounting, preferred the above appeal.

2. The case of the plaintiffs as set out in their plaint is briefly stated hereunder:
The suit properties and other properties originally belonged to Arumugha Mudaliar. His wife is Unnamalai Ammal. They had two daughters and a son by name Mangalam, Saraswathi and Jayasubramanian. Mangalam died about 15 years back. Her son is first defendant, whose son is second defendant. Saraswathi is the second plaintiff, whose son by name Senthilkumar is the first plaintiff. Unnamalai died 20 years back. Arumugha Mudaliar executed a deed of power of attorney in favour of the first defendant on 18-12-82, as he was unable to manage his affairs. Thereafter, it was duly revoked on 17-7-84 by means of a registered deed as Arumugha Mudalair was fit to manage his affairs. Arumugha Mudaliar's only son Jayasubramanian died without any issues in August, 1982 leaving behind him his widow Saroja Ammal, 3rd defendant as his heir.

3. Since Arumugha Mudaliar had no male issues, he adopted the first plaintiff, his daughter's son according to Hindu sastras on 18-8-84 after following all the rituals. There was proper giving and taking of the boy according to sastras. Evidencing the adoption, a registered deed was executed and as per the same, all the properties of Arumugha Mudaliar, he is entitled to a half share and the adopted son to the other half share.

4. On 20-8-84 Arumugha Mudaliar executed a settlement deed in favour of the first plaintiff in respect of the properties not mentioned in the suit schedule and they are in possession of the plaintiffs. The said deed was duly executed, validly attested and acted upon.

5. On 11-10-84, Arumugha Mudaliar executed a will in respect of all the properties immoveables and moveables that belonged to him. It was duly executed, validly attested and executed in a sound and disposing state of mind. It was the last will and testament of the deceased. As per the terms of the will, the first plaintiff is absolutely entitled to the properties in Schedule A and B of the will, while 2nd plaintiff is entitled to the properties described in Schedule C to the will. The properties that have been bequeathed to the first plaintiff are described in B schedule to the plaint and properties bequeathed to the 2nd plaintiff are described in C schedule to the plaint. Movables described in the E schedule of the plaint belong to the first plaintiff as per the will.

6. For about 2 months prior to his death, Arumugha Mudaliar was suffering from high blood pressure, diabetes and kidney trouble. He was staying with the 2nd plaintiff in her house at Jayapuram colony. Thereafter, Arumugha Mudaliar was taken to Pullichapallam and was looked after by the second plaintiff and her husband who were staying with them. Three days prior to his death, he lost is consciousness and was in a comatic stage till he died on 14-1-85 at 2.00 P.M. The news of his death was informed to every body including the first defendant. A week after Arumugha Mudaliar's death, 2nd plaintiff and her husband went to their house at Jayapuram colony to look into state of things there. When they returned, first defendant refused to allow 2nd plaintiff and her husband inside the house.

7. First defendant issued a notice on 23-1-85 to the 2nd plaintiff and Saroja setting up a will dated 13-1-85 said to have been executed by Arumugha Mudaliar. The second plaintiff waited for an amicable settlement. As nothing was fructified, she issued a reply on 17-7-85. After the revocation of the power of attorney deed on 17-7-84, after the adoption of first plaintiff on 18-8-84, in favour of the first plaintiff and after the registered will dated 11-10-84, it is unnatural to expect Arumugha Mudaliar to execute a unregistered will in favour of defendants, completely disinheriting plaintiffs and Saroja. The plaintiffs assert that no will was executed by Arumugha Mudaliar as alleged by first defendant. It is a rank forged one. In view of the attitude of the defendants, the plaintiffs have filed a suit claiming necessary relief.

8. The first defendant filed a separate written statement wherein he denied the execution of adoption deed on 18-8-84, adopting the first plaintiff according to sastras. There was neither an adoption nor a valid adoption. Arumugha Mudaliar executed a settlement deed on 20-9-84 which is neither true nor valid. Like wise, Arumugha Mudaliar never executed a will on 11-10-84 in respect of the movables and immoveables in a sound disposing state of mind and that the will is his last will and testament as per which first plaintiff is entitled to the properties in schedule A and B of the will while 2 nd plaintiff to schedule C of the will. The will propounded by the plaintiffs is false, unnatural and the same was created with undue influence and misrepresentation. On the other hand, out of love and affection and free will, Arumugha Mudaliar bequeathed his properties in favour of first defendant and third defendant, who is his widowed daughter-in-law by means of a will dated 13-1-85. The said will was executed in a sound disposing state of mind and the same was his last will and testament. Non-registration of the will is not a disqualification. The plaintiffs are not entitled any of the reliefs prayed for by them.

9. The third defendant filed a separate written statement wherein it is stated that the suit properties and other properties originally belonged to Arumugha Mudaliar is false. She also denied the adoption deed executed on 18-8-84 in favour of the first plaintiff. She equally denied the execution of the settlement dated 20-9-84 by Arumugha Mudaliar in favour of first plaintiff. She further denied the execution of the will dated 11-10-84 by Arumugha Mudaliar in respect of all properties in favour of the first plaintiff. The said will is false and the same was not executed by Arumugha Mudaliar. Even otherwise, the said will is void in law as it is in respect of joint family properties.

10. Fourth defendant filed a separate written statement wherein he admitted the execution of power of attorney of Arumugha Mudaliar in favour of the 1st defendant on 18-12-1982. Eversince then, first defendant was managing the properties as per the power of attorney of the said Arumugha Mudaliar. During the subsistence of the agreement, he offered to sell certain items of the suit properties and enter into an agreement on 5-7-84. He had parted with a consideration of Rs.60,000/- and agreed to pay the balance within a period of 4 months and get a document executed in his favour. As per the agreement, he is in possession of certain items in part performance of the agreement. He

denied the truth of the will put-forward by the plaintiffs.

11. Third defendant filed an additional written statement wherein it is stated that her husband Jayasubramanian died in 198 2 and she is his widow and there was a son by name Kumaresan, who died in 1980 when he was 3 years old. On his death, his < share devolved on the third defendant as Class I heir. Later, the said Jayasubramanian died intestate in 1982 and on his death, his < share also devolved on the third defendant as Class I heir. Thus, the third defendant was entitled to half share, while the deceased Arumugha Mudaliar was entitled to another half share in the entire properties.

12. With the above pleadings, 7 witnesses were examined as P.Ws.1 to 7 and Exs. A-1 to A-26 marked on the side of the plaintiffs. Third defendant was examined as D.W.1 and one Mohamed Ismail as D.W.2, besides marking Exs. B-1 and B-2 on the side of the contesting third defendant. The learned Subordinate Judge after framing necessary issues and considering the materials on record, after holding that adoption deed dated 18-8-84 (Ex.A-2), will dated 13-10-84 (Ex.A-3) are not valid, non suited the plaintiffs and dismissed the suit. As said earlier, questioning the same, the plaintiffs have filed the present appeal.

13. Heard Mr. V. Raghavachari, learned counsel for the appellants and Mr. D. Srinivasa Raghavan, for the respondents.

14. The following points arise for consideration:
i) Whether adoption of the first plaintiff-1st appellant herein by Arumugha Mudaliar on 18-8-84 under Ex. A-2 was true and valid?

ii) Whether plaintiffs have established the factum of adoption and when the same was registered, the presumption under Section 16 of Hindu Adoptions and Maintenance Act, 1956 is to be applied or not coupled with the oral and documentary evidence to prove that there was valid adoption?

iii) Whether the plaintiffs have established that Ex.A-3, a registered will is the last will and testament of Arumugha Mudaliar by placing acceptable evidence?

iv) Whether the suit properties are the joint family properties of the plaintiffs and defendants; and if so, whether late Arumugha Mudaliar was competent to execute Ex.A-3-will and settlement under Ex. A-23?

15. In order to appreciate the above points, it would be useful to refer Genealogy as mentioned in the plaint.
GENEALOGY
ARUMUGHA MUDALIAR (Died on 14-1-85)
=
Unnamalai-wife (Died)
|

| | |
Mangalam Saraswathi Jayasubramanian

= (2nd plaintiff) (Died in August,82)
Ramasami = =
| Chockalingam Saroja (wife-3rd
Dhandapani (husband) defendant)
(1st defendant) |
| Minor Senthilkumar
Minor Senthil (1st plaintiff)
velan (2nd
Defendant)

Now we shall consider the points relating to adoption under Ex.A-2 dated 18-8-84, adopting first plaintiff as legal heir of Arumugha Mudaliar. The above genealogy shows that Arumugha Mudaliar had two daughters and a son, namely, Mangalam, Saraswathi and Jayasubramanian. The first defendant is the son of Mangalam. The second defendant is the son of the first defendant. Saraswathi is the second plaintiff, whose son Senthilkumar is the first plaintiff. Unnamalai, wife of Arumugha Mudaliar died 20 years back. Their only son Jayasubramanian died in August, 1982, leaving his wife Saroja, third defendant. Though Arumugha Mudaliar initially executed a deed of power of attorney in favour of first defendant on 18-12-82, thereafter, since he was fit to manage his affairs, the power of attorney was revoked on 17-7-84 by means of a registered deed-Ex.A-1. There is no dispute with regard to the same. Since Arumugha Mudaliar after the death of his only sonJayasubramanian, had no male issues, according to the plaintiffs, he adopted the first plaintiff, who is none-else than his second daughter's son, according to Hindu Sastras on 18-8-84, after following all the rituals. In the plaint, it is specifically stated that there was proper giving and taking of the boy according to Hindu Sastras. Evidencing the adoption, an adoption deed was registered and as per the said document, Arumugha Mudaliar is entitled to half share and the adopted son to the other half share. It is the claim of the defendants that as the adoption said to have been done on 18-8-84 is not valid, the first plaintiff or any other person claiming to be adopted son under the cover of Ex. A-2 is not entitled to any share in the suit properties. As said earlier, in the plaint, the plaintiffs have specifically pleaded that since Arumugha Mudalair, after the death of his son-Jayasubramanian, had no male issues, he adopted the first plaintiff, his daughter's son, according to Hindu Sastra on 18-8-84, after following all the rituals. P.W.1-Chockalingam, father of first plaintiff and husband of second plaintiff narrated in his evidence that Arumugha Mudaliar had no male issues, and that after the death of his only son-Jayasubramanian, he adopted first plaintiff on 18-8-84, for which a Homam (holy fire) was raised and all formalities under Hindu Sastra were performed. He also deposed that an adoption deed was registered and Ex. A-2 is the said deed. He also deposed that one Govindasamy and Thiruvengada Battachariar and others witnessed the adoption ceremony.

16. Apart from the evidence of P.W.1, one Kandasamy, who took photographs of all the events of the ceremony of adoption, was examined as P.W.2. He is a native of Kodur. He knows plaintiffs and Arumugha Mudaliar. He explained in his evidence that on the date of adoption, since Arumugha Mudaliar had no male

issues, he adopted the first plaintiff. According to him, the adoption was performed at the residence of Arumugha Mudaliar. He also deposed that all along he was in his house and it was he who took photos of the entire events of the ceremony. The second plaintiff and her husband (P.W.1) handed over (jhiu thu;j;Jf;bfhLj;jhu;fs;) their son, first plaintiff to Arumugha Mudaliar, who, in turn, accepted the same. The relatives of Arumugha Mudaliar and other local residents attended the function. He asserted that the adopted ceremony was performed in accordance with the Hindu Sastra. In cross-examination, P.W.2 has stated that on 18 -8-84 the adoption ceremony was performed between 8 A.M. and 9.30 A. M. At one stage he said that the adoption ceremony came to an end by 9-45 A.M. It was explained that since on the date of his chief examination, negatives were not brought to the Court, on application by the plaintiffs, P.W.2 was recalled and through him photographs with negatives taken on 18-8-84 were marked. Exs. A-10 to A-22 are photos with respective negatives. An argument was advanced that 18-8-84 being a Saturday and after 9 A.M it was not an auspicious time, the function could not have taken place as claimed by the plaintiffs' witnesses, particularly as spoken to by P.W.2. On going through his entire evidence, we are unable to accept the said contention. It is the evidence of P.W.2 that the function started at 8 A.M. and ended by 9.30 A.M. It is not in dispute that 8 to 9 A.M. was an auspicious time and merely because the function went beyond 9 A.M. and ended only at 9.30 A.M., it cannot be said that there was no function at all. We also verified photographs and negatives-Exs. A-10 to A-22 which would clearly depict the ceremonies performed for adoption of first plaintiff. The photographs also clearly show the presence of parents of adopted son namely first plaintiff and P.W.1, Arumugha Mudaliar, Prohit and other relatives and well-wishers.

17. Apart from the evidence of P.Ws.1 and 2, one Govindasamy Mudaliar, an attestor of Ex. A-2, was examined as P.W.3. In his evidence, he explained the fact that since Arumugha Mudaliar had no male issues after the death of Jayasubramanian, he adopted the first plaintiff, that function took place 42 years ago, that Prohit performed the function by raising Homam (sacred fire), and that the parents of adopted son handed over their son (jhiu thu;j;J) to Arumugha Mudaliar in the presence of relatives and elders. P.W.3 also identified P.W.2 that it was he who took photographs of the events of the function. He also referred to the presence of P.W.1, other relatives, well-wishers, and elders of the village. It was he who attested Ex. A-2. He also deposed that he saw Arumugha Mudaliar signing Ex.A-2 and thereafter he attested the said document. Though there is some discrepancy in the cross-examination of P.W.3, who being one of the attestors, supports the claim of the plaintiffs, more particularly ceremonies, other functions and adoption of first plaintiff. There is no reason to reject his evidence. In addition to P.W.3, plaintiffs have also examined the scribe who wrote Ex.A-2 as P.W.6. He also referred to the ceremonies performed, participation of the parents of the adopted son, Arumugha Mudaliar giving and taking of first plaintiff. His evidence (P.W.6) coupled with the evidence of P.W.1, P.W.2 and P.W.3 amply prove that the adoption ceremony performed in accordance with law.

18. We are satisfied that there is a specific plea with reference to mode of adoption, ceremonies, presence of P.Ws.1 to 3, other relatives and

well-wishers. The oral evidence of P.Ws.1 to 3 also supports the case of plaintiffs to show that there was a valid adoption on 18-8-84. It is also clear from the materials placed that second plaintiff and P.W.1, parents of adopted son who after performing poojas/mantras as per the Hindu Sastras, handed over their son to Arumugha Mudaliar, who also accepted him as his adopted son in the presence of relatives, elders of his village, etc. The said adoption was entered as a document under Ex. A-2 and the same was duly registered. P.W.2-photographer explained about the adherence of all the ceremonies and P.W.3, one of the attestors of Ex. A-2 also explained the ceremonies and the valid execution of the adoption deed. It is also relevant to note that if a document is registered in accordance with law, it is presumed that the adoption has b een made in compliance of the provisions of Hindu Adoptions and Maintenance Act, 1956. It is relevant to note Section 16 of the Act:

"Section 16. Presumption as to registered documents relating to adoption.- Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."

It is clear from the above provision since Ex.A-2 adoption deed has been duly registered, the general presumption is that adoption has been validly made in compliance with the provisions of The Hindu Adoptions and Maintenance Act, 1956 until it is disproved. It is true that though the parents of the adopted child were present at the time of adoption, they have not signed the adoption deed. However, as said earlier, the photographs, Exs. A-10 to A-22 clearly prove the presence of the parents of the adopted child, acceptance of the adoption by Arumugha Mudaliar and the ceremonies that followed in accordance with the Hindu sastras.

19. For a valid adoption, the physical act of giving and taking is an essential requisite, a ceremony imperative in all adoptions whatever the caste. This requisite is satisfied in its essence only by the actual delivery and acceptance of the boy, even though there exists an expression of consent or an executed deed of adoption. In the case of Madhusudan Das v. Narayani Bai, reported in AIR 1983 Supreme Court 114, Their Lordships of the Supreme Court have held that a person who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity. They further held that the proof shall be free from all suspicion of fraud and so consistent and probable as to give no occasion for doubting its truth. The fact of adoption must be proved in the same way as any other fact. Here, in the case on hand, as said earlier, the factum of adoption, other conditions, ceremonies, performance etc., were spoken to by P. Ws.1 to 3 and in addition to the same, Ex.A-2-adoption deed has been duly registered. In such a circumstance, we are satisfied that requisite conditions were fulfilled in adopting first plaintiff as adopted son of Arumugha Mudaliar.

20. The statement of law made by the Division Bench of the Mysore High Court in Govinda v. Chimabai, reported in AIR 1968 Mysore 309 relating to proof of adoption is relevant: (paa 18)

"18. The law relating to the proof of adoption is that the person claiming to be an adopted son must prove the factum of his adoption by cogent and reliable evidence, and where the adopter denies the adoption, the onus is still heavier on the plaintiff to establish his adoption and its validity. This is what the Supreme Court states in Kishori Lal v. Mt. Chaltibai, AIR 1959 SC 504.

"As an adoption results in changing the course of succession depriving wives and daughters of their rights and transferring properties to comparative strangers or more remote relations, it is necessary that the evidence to support should be such that it is free from all suspicions of fraud and so consistent and probable as to leave no occasion for doubting its truth."

It is settled law that in order to judge the credibility of the witnesses, the Court is not confined only to the way in which the witnesses have deposed or to the demeanour of witnesses, but it is open to it to look into the surrounding circumstances as well as the probabilities, so that it may be able to form a correct idea of the trust worthiness of the witnesses. In the case on hand, in order to prove that Ex. A-2 is a valid document, the plaintiffs have already demonstrated that after the death of his only son, namely, Jayasubramanian, Arumugha Mudaliar had no male issues except his two daughters Mangalam and Saraswathi. Since he desired to have a male issue, he adopted Senthilkumar, first plaintiff who is none-else than his second daughter's son. We have already observed that plaintiffs have established the requisite conditions to be fulfilled in adopting child. Apart from the evidence of P.Ws.1 to 3, the photographs with negatives-Exs.A-10 to A-22 also prove that there is valid adoption and compliance of conditions prescribed in the Hindu Adoptions and Maintenance Act, 1956. In addition to the same, the adoption deed was duly registered before the competent authority which also strengthened the case of the plaintiffs, making us to have a presumption that it was a valid adoption. These material aspects were properly considered by the learned Subordinate Judge and in spite of that, he committed an error in rejecting Ex.A-2. Therefore, we hold that the adoption of first plaintiff/

first appellant under Ex.A-2 dated 18-8-84 was true and valid and the same has been made in compliance of the provisions of the Hindu Adoptions and Maintenance Act, 1946.

21. Now we shall deal with Ex.A-3-registered will dated 11-10-84 executed by Arumugha Mudaliar. According to the plaintiffs, on 11-10-84 Arumugha Mudaliar executed a will in respect of all the properties of movables and immovables that belonged to him on that date. It is also their claim that the same was duly executed in a sound and disposing state of mind and validly attested. It was the last will and testament of the deceased. On the other hand, it is the claim of the first defendant that Arumugha Mudaliar executed a last will on 13-1-85 bequeathing his properties in favour of him (first defendant). It is his claim that the will dated 13-1-85 alone is true, valid and it is executed

in a sound and disposing state of mind. His contention is, though the same was not registered, it is not a disqualification. It is relevant to point out here that though the first defendant claimed right through the will said to have been executed on 13-1-85 by Arumugha Mudaliar, admittedly, the said will has not been produced before the trial Court and marked as an exhibit. Unfortunately the learned trial Judge was very much impressed on the bald claim of the first defendant and proceeded to arrive at a conclusion that the will dated 13-1-85 said to have been executed in favour of first defendant is a valid document and the same could be considered as the last will of testament executed by Arumugha Mudaliar. The nonproduction and non-marking of the will before the trial Court would go to show that the same cannot be considered and the contrary conclusion arrived at by the learned trial Judge is liable to be set aside.

22. Now let us consider whether the plaintiffs have established the genuineness and validity of Ex. A-3 in accordance with law. As said earlier, the plaintiffs have specifically pleaded that Ex. A-3-will dated 11-10-84 was duly executed in a sound and disposing state of mind and validly attested. As per the terms of the will, the first plaintiff is absolutely entitled to the property described in schedule A and B of the will, while the second plaintiff is entitled to the properties described in schedule C to the will. The executant Arumugha Mudaliar died only on 14-5-85, nearly after 3 months of the execution of Ex.A-3 will. In order to prove the due execution and validity of Ex. A-3, the plaintiffs have examined one of the attestors of the will, namely, Umar Dhatha as P.W.4. He deposed that while drafting the will-Ex.A-3, he was very well present and the same was written by Kalyanasundaram-P.W.5. After the drafting process is over, Arumugha Mudaliar signed the will and he saw Arumugha Mudaliar signing the will. He put his signature as attestor in the will along with one Seenu. In cross examination, he mentioned that Ex.A-3 was written in 1984 and he did not know the exact month and date. By pointing out certain discrepancies in his statement that only one person attested Ex. A-3 etc., learned counsel for the first defendant contended that P.W.4 would not have attested the will. After going through his entire evidence, we are unable to accept the said contention. It is to be noted that though the will Ex. A-3 was executed on 11-10-84, P.W.4 was examined in the Court nearly after 4 years i.e., on 2-12-88 and in such a circumstance, one cannot expect that P.W.4 should say or depose all the details about the will accurately. Any how, the fact remains that he is one of the attestors of Ex. A-3 and he saw Arumugha Mudaliar signing Ex.A-3 in his presence and it is his evidence that the will was written by Kalyanasundaram-P.W.5. There is no reason to disbelieve the version of P.W.4. Thus, the plaintiffs have complied with the requirement under Section 68 of the Indian Evidence Act.

23. In order to prove the genuineness and due execution of Ex.A-3, the plaintiffs have also examined the scribe of that document as P.W.5. He explained before the Court that it was he who wrote Ex.A-3 on direction by Arumugha Mudaliar. He followed the instruction given by Arumugha Mudaliar and on completion of the drafting of the will-Ex. A-3, Arumugha Mudaliar signed and he saw the same. At the end of the document, he also signed as the person who has written the document. He deposed that P.W.3-Govindasamy Mudaliar was one of the attestors of Ex.A-3. The will was registered. Though he has

stated that he was not aware of the entire contents of the will, however, he

asserted that Arumugha Mudaliar was hale and healthy and was in a sound and disposing state of mind. We accept the evidence of P.W.5, who supported the evidence of P.Ws.2 and 3 regarding due execution of Ex. A-3.

24. The materials placed by the plaintiffs, particularly the evidence of P.W.4, attestor and P.W.5, scribe of Ex.A-3 and the fact that the testator Arumugha Mudaliar was hale and healthy and in a sound and disposing state of mind on the date of execution of Ex.A-3 and died only on 14-1-85 clearly prove that Ex.A-3 was his last will of testament bequeathed by him. We hold that Ex. A-3 was validly executed by the testator-Arumugha Mudaliar in a sound and disposing state of mind and the plaintiffs have established the same by placing acceptable oral and documentary evidence. The contrary conclusion arrived at by the learned Subordinate Judge with reference to Ex. A-3 is liable to be set aside.

25. Coming to the last contention that Arumugha Mudaliar has no right to execute a will, a faint opposition was made by the third defendant while he was examined as D.W.3. We have already referred to the relationship of the parties and there is no dispute that the entire suit properties and other properties originally belonged to Arumugha Mudaliar. His only son Jayasubramanian died long back, leaving behind his widow Saroja-third defendant. We have already held that since after the death of Jayasubramanian, he had no male issues, he adopted the first plaintiff, his daughter's son according to Hindu sastras on 18-8-84, after following all the rituals. It is also in evidence that on 20-8-84 Arumugha Mudaliar executed a settlement deed in favour of the first plaintiff in respect of the properties other than the plaint schedule properties that were in possession of the plaintiffs. Thereafter, on 11-10-84 he executed a will under Ex.A-3 in respect of all the properties both movables and immovables that belonged to him. It was executed in a sound disposing state of mind and validly attested. As per the terms of the will-Ex.A-3, first plaintiff is entitled to the properties in schedule A and B of the will, while second plaintiff is entitled to the properties described in schedule C to the will. We have already observed that though first defendant very much relied on a will dated 13-1-85 said to have been executed by Arumugha Mudaliar bequeathing his properties in his favour, admittedly the same was not produced before Court and proved in the manner known to law. It is the claim of the contesting defendants that Arumugha Mudaliar under the law could not have executed the will dated 11 -10-84 in relation to the joint family properties. It is useful to refer Section 30 of the Hindu Succession Act, 1956 which reads as under:

"Section 30. Testamentary succession:
Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.

Explanation: The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarward, tavazhi, illom, kutumba or

kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section."

The above provision makes it clear that any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925. The Explanation clarify that the interest of a male Hindu in a Mitakshara copar cenary property shall be deemed to be property capable of being disposed of by him or by her within the meaning of this section. The Explanation clearly states that the interest of a male Hindu in a Mitakshara coparcenary property shall notwithstanding anything contained in this Act (Hindu Succession Act, 1956) or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of Section 30 of the said Act. In such a circumstance, the objection that the will-Ex.A-3 in relation to the joint family property could not be executed has to be rejected. The disability of a coparcener in disposing of his undivided interest in the property by Will or other testamentary document under the old Hindu Law is removed by Section 30. Even otherwise, if there was any prohibition under the old Hindu Law the same stands removed after coming into force of Section 30 of the Hindu Succession Act. The learned Subordinate Judge failed to analyse these aspects and he committed an error in rejecting the claim of the plaintiffs. The Court below failed to note that there is no evidence, documentary or otherwise, to hold that the suit properties are joint family properties and it also failed to note that even so the surviving coparcener- late Arumugha Mudaliar was competent to bequeath his properties.

26. For the above discussions, we are unable to accept the conclusion arrived at by the learned Subordinate Judge and we hold that the plaintiffs have established their case and proved that Exs. A-2 and A-3 adoption deed and will respectively are valid and enforceable. The plaintiffs/appellants herein are entitled to all the reliefs as claimed. Accordingly, the judgement and decree of the trial Court dated 15-02-1989 is set aside; consequently the Appeal is allowed. However, in view of the relationship of the parties, there shall be no order as to costs.

R.B.

Index:- Yes.
Internet:- Yes.

To:-
1. The Subordinate Judge, Tindivanam (with records)

2.The Record Keeper, V.R.Section, High Court,Madras.

□